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BEFORE THE STATE BOARD OF LAND COMMISSIONERS

SHARLIE-GROUSE NEIGHBORHOOD ASSOCIATION, INC.,

Petitioner,

v.

IDAHO STATE BOARD OF LAND COMMISSIONERS,

Respondent,

and

PAYETTE LAKES COTTAGE SITES OWNERS ASSOCIATION, INC., and WAGON WHEEL BAY DOCK ASSOCIATION, INC.,

Intervenors.

SGNA'S RESPONSE BRIEF IN OPPOSITION TO INTERVENORS' MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

This brief is submitted by Sharlie-Grouse Neighborhood Association, Inc. ("SGNA") in opposition to the *Motion for Summary Judgment* ("*MSJ*") and *Memorandum in Support of Motion for Summary* Judgment ("*Intervenors' Opening Brief*") filed by Intervenors Payette Lakes Cottage Sites Owners Association, Inc. ("PLCSOA") and Wagon Wheel Bay Dock Association ("WWBDA") on April 15, 2019. PLCSOA and WWBDA are referred to collectively as "Intervenors."

In a separate brief, *SGNA's Response Brief in Opposition to Land Board's Motion for Summary Judgment* ("*Response to Land Board*"), SGNA responds to *Respondent's Motion for Summary Judgment and Supporting Memorandum* ("*Motion and Brief*") filed by the Idaho State Board of Land Commissioners ("Land Board") on April 15, 2019. Arguments made in that brief are not repeated here, but are instead incorporated herein by this reference. Likewise, SGNA incorporates by reference *SGNA's Opening Brief on Motion for Summary Judgment* ("*SGNA's Opening Brief*") filed on April 15, 2019.

The Land Board and Intervenors are referred to collectively as "Auction Opponents." The Land Board oversees the Idaho Department of Lands ("IDL"). This brief employs the same shorthand definitions as *SGNA's Opening Brief.*

Like the Land Board, Intervenors have elected not to seek summary judgment on the merits. Instead, Intervenors focus exclusively on three procedural/jurisdictional/equitable defenses: laches, indispensable parties, and standing. None have merit.

ARGUMENT

I. EQUITY DOES NOT PROHIBIT THE RELIEF SOUGHT BY SGNA; IT DEMANDS IT.

A. Laches is no bar to relief.

In *Intervenors' Opening Brief*, Intervenors contend that the *Quitclaim Deeds* should be protected from examination, even if illegal, because SGNA is guilty of laches in filing its *Petition*.[1] *Intervenors' Opening Brief* at 13-15. Intervenors cite no authority suggesting that laches even applies in administrative proceedings like this one, and SGNA is aware of none. In any event, the doctrine should not serve as a shield to the Land Board's violation of the Constitution.

The burden of proof is on the party raising laches as a defense. Idaho courts recognize four necessary elements to maintain the defense:

> (1) defendant's invasion of plaintiff's rights; (2) delay in asserting plaintiff's rights, the plaintiff having had notice and an opportunity to institute a suit; (3) lack of knowledge by the defendant that plaintiff would assert his rights; and (4) injury or prejudice to the defendant in the event relief is accorded to plaintiff or the suit is not held to be barred.

Thomas v. Arkoosh Produce, Inc., 137 Idaho 352, 359, 48 P.3d 1241, 1248 (2002) (Trout, C.J.).

As for undue delay, the reality is that various SGNA members have tried vigorously, albeit unsuccessfully, to protect and preserve Community Beach in its natural state. See *Declaration of Zephaniah Johnson* and *Declaration of Diane Bagley*.

Perhaps SGNA's individual members can be faulted for various false starts under the direction of prior counsel. But the fact is, they have been trying to make things right from day

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[1] In presenting their argument, Intervenors conflate SGNA and some of its individual members who have engaged in prior litigation and administrative challenges bearing in one way or another on the property in question. The subject *Petition* is the first and only legal action taken by SGNA.

one. Laches is an equitable remedy, and equity should not come down hard on citizens who—far from sleeping on their rights—have done their best to protect their interests and the public resource that is impaired by the Land Board's illegal action.

As for lack of knowledge by the defendant, all concerned knew that the Land Board's action was hotly and vigorously contested and would continue to be so. Intervenors cannot contend they were caught by surprise by SGNA's petition.

As for prejudice to the defendant, the "defendant" here is the Land Board, which will suffer no prejudice from the protection of the Trust. To the extent the doctrine concerns itself with prejudice to Intervenors, their so-called prejudice amounts to loss of an unearned windfall. Some of their members have submitted affidavits contending that their property is more valuable as a result of the Land Board's illegal conveyance.[2] If so, this is a windfall derived from another's illegal action. Equity does not favor those who gain an unearned benefit from an unconstitutional conveyance, particularly a sweetheart deal that took value from a public trust and illegally bestowed it upon them.[3]

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[2] The affiants do not contend that they paid a higher price for their cottage sites because of the *Quitclaim Deeds*. They only contend that their property is worth more because of the *Quitclaim Deeds*. That difference is a windfall. Curiously, their affidavits fail to explain why their property is worth more. They say only that property with lake access is more valuable than property without lake access. That is undoubtedly true. But they had lake access before the *Quitclaim Deeds*, and they will continue to have lake access if the *Quitclaim Deeds* are invalidated. Presumably the thing they really mean is their property is worth more because of the subsequent action by WWBDA that destroyed the natural character of Community Beach, turning it into a noisy parking lot for their new private dock.

[3] "Left to stand, however, and as it should be, is the philosophy there expressed that the third party should not receive a windfall which he has done nothing to deserve." *Tucker v. Union Oil Co. of Calif.*, 100 Idaho 590, 610, 603 P.2d 156, 176 (1979) (Shepard, J.). "A so-called balancing of the equities does not require that the negligent third-party tortfeasor be given the windfall apples which have fallen from the tree of the negligent employer." *Id.*, 100 Idaho at 612, 603 P.2d at 178.

If there is a role for equity to play here, it is not to shield an illegal transaction from scrutiny. Equity may come into play later, when the transaction is unwound.

In the event the Land Board rescinds the *Quitclaim Deeds* (or otherwise recognizes their unconstitutionality), there must inevitably be some sorting out of who is entitled to what. As the Land Board noted in its recent decision to rescind the illegal lease at Tamarack Bay (see SGNA's *Response to Land Board*, section V at 15), it may be necessary to "negotiate a mutually acceptable settlement with the current leaseholder to compensate the leaseholder for costs and expenses incurred." Land Board Minutes at 8 (Apr. 16, 2019) (SGNA's *Response to Land Board*, Attachment A).

In this case, such a negotiation may recognize that the successful bidder at a public auction of Community Beach is required to compensate the prior owner (Intervenors) for the value of improvements (their new dock). It may also recognize that the State, too, has an obligation to the Intervenors, having led them down "a primrose path" (to quote from the Land Board's recent decision in the Tamarack Bay decision). In any event, SGNA does not oppose appropriate measures to compensate Intervenors for the value of their investment in the dock, should it be removed and the beach restored and protected.

B. Equity requires the Land Board to address this constitutional violation, irrespective of any party's procedural failing.

Equity requires consideration of the bigger picture.

> Because the doctrine of laches is founded in equity, in determining whether the doctrine applies, consideration must be given to all surrounding circumstances and acts of the parties. The lapse of time alone is not controlling on whether laches applies.

Thomas v. Arkoosh Produce, Inc., 137 Idaho 352, 359, 48 P.3d 1241, 1248 (2002) (Trout, C.J.) (citations omitted).

Our courts have long recognized that public policy is a central concern in the application of equitable principles. Here, the public policy elephant in the room is the Land Board's violation of a sacred constitutional duty.

In a case that has been cited 79 times (for this and other points), our Supreme Court observed that contracts against public policy are void, and "[p]ublic policy may be found and set forth in the constitution or in the statutes." *Stearns v. Williams*, 72 Idaho 276, 287, 240 P.2d 833, 840 (1952) (Thomas, J.).

> A party to a contract, void as against public policy, cannot waive its illegality by failure to specially plead the defense or otherwise, but whenever the same is made to appear at any stage of the case, it becomes the duty of a court to refuse to enforce it; again, a court of equity will not knowingly aid in the furtherance of an illegal transaction; in harmony with this principle, it does not concern itself as to the manner in which the illegality of a matter before it is brought to its attention. Furthermore, the court itself will raise the question of the invalidity of a contract which offends public policy and, as stated before, the parties cannot waive it.

Stearns, 72 Idaho at 290, 240 P.2d at 842 (citations omitted) (emphasis supplied).

The holding was reiterated in 1969. "This court undoubtedly has the power to raise the questions of illegality and public policy *sua sponte*." *Nab v. Hills*, 92 Idaho 877, 882, 452 P.2d 981, 986 (1969) (Donaldson, J.) (quoted in *Braddock v. Family Finance Corp.*, 95 Idaho 256, 506 P.2d 824 (1973) (Bakes, J., dissenting); *Crane Creek Country Club v. City of Boise*, 121 Idaho 485, 826 P.2d 446 (1992) (Bistline, J., concurring)).

It was addressed again in 1997.

> Whether a contract is against public policy is a question of law for the court to determine from all the facts and circumstances of each case. Public policy may be found and set forth in the statutes, judicial decisions or the constitution. An illegal contract is one that rests on illegal consideration consisting of any act or forbearance which is contrary to law or public policy. A contract prohibited by law is illegal and hence unenforceable.

> . . . [I]n Idaho a court may not only raise the issue of whether a contract is illegal *sua sponte*, but it has a duty to raise the issue of illegality, whether pled or otherwise, at any stage in the litigation. *Stearns*.

Quiring v. Quiring, 130 Idaho 560, 566-67, 944, P.2d 695, 701-02 (1997) (Schroeder, J.) (citations omitted) (emphasis supplied).

This was drilled home in the Court's recent decision in the case challenging the illegal contract awarded for the Idaho Education Network:

> The district court correctly concluded that *Quiring* imposed on it a duty to invalidate the SBPOs if they were unlawful. If the SBPOs were void for violating state procurement laws, as the district court ultimately concluded, then it was proper for the district court to find that it had an independent duty to invalidate them. We affirm the district court's holding that it had a duty to raise the issue of illegality of the SBPOs, regardless of whether Syringa could raise that issue on remand.

Syringa Networks, LLC v. Idaho Dep't of Admin. ("*Syringa II*"), 159 Idaho 813, 822-23, 367 P.3d 208, 217-18 (2016) (J. Jones, J.) (emphasis supplied).

In sum, no failing of the parties relieves a court—or, here, the Land Board—of its power and duty to recognize the invalidity of a transaction against public policy. Likewise, Intervenors' allegation of tardiness by SGNA, even if it had merit, does not relieve the Land Board of its responsibility to call out a constitutionally defective conveyance. Equity does not bar relief here, it demands it.

II. SGNA HAS NOT FAILED TO JOIN INDISPENSABLE PARTIES.

A. Intervenors misunderstand Rule 19.

Intervenors complain that SGNA has failed to join indispensable parties, namely "the numerous parties who have purchased cottage sites from the State at auction within PLCSOA."

Intervenors' Opening Brief at 12. In essence, Intervenors contend that their own members' interests are so inadequately represented by them that this contested case must be dismissed.

Intervenors do not say what they mean by indispensable parties. Presumably, they are referring to Idaho R. Civ. P. 19 (Required joinder of parties) ("Rule 19"). Under that rule and the identical federal rule, "necessary parties" are whose that must be joined if possible (Rule 19(a)), and "indispensable parties" are those whose failure to join (because they are beyond the reach of the court) results in dismissal of the action (Rule 19(b)).[4]

Intervenors are confusing the two subsections of Rule 19. They contend that the *Petition* must be dismissed because SGNA has "failed to name the numerous parties who have purchased cottage sites from the State at auction within PLCSOA." *Intervenors' Opening Brief* at 12. If these people must be joined, they are necessary parties, not indispensable parties. They would be indispensable only if they live in Zimbabwe or are otherwise unreachable.

This is not just a semantic point. Because these cottage site owners could be served, the remedy (if they were necessary parties) would be to order their joinder under Rule 19(a)(2), not to dismiss the contested case. For reasons discussed below, such a delay in proceedings is uncalled for.

First of all, Rule 19 does not even apply. Second, this proceeding is governed not by Rule 19 but by the Land Board's intervention rules. Third, even if Rule 19 applied, these cottage site owners do not qualify as necessary parties under Rule 19(a), much less indispensable parties under Rule 19(b).

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[4] The rule does not employ the terms "necessary" and "indispensable" parties. These are the arcane words of art that lawyers have used for many decades to describe parties under these two subsections.

B. Rule 19 does not apply to contested cases before the Land Board.

The Land Board's regulations state that the civil rules do not apply. "Unless required by statute, the Idaho Rules of Civil Procedure and the Idaho Rules of Evidence do not apply to contested case proceedings conducted before the agency." IDAPA 20.01.01.052.

C. The Land Board's rules on intervention do apply.

Instead, the Board has its own processes in place to address "interested persons" such as those identified by the Intervenors. *See* IDAPA 20.01.01.158; *see also* IDAPA 20.01.01.350 to 20.01.01.354.

Cottage site owners within PLSCOA would be well within their rights to intervene on their own account to the extent they do not believe their interests are well-served by the Intervenors (the very organizations they created to represent them) and to the extent they do so timely. They did not.[5]

First, the Rules afford persons the opportunity to intervene, as PLCSOA and WWBDA know and accomplished in a timely fashion months ago. In addition to naming the Land Board as the respondent, SGNA served the *Petition* upon PLCSOA by mail to afford it and its membership (which includes all WWBDA members) notice of the administrative petition. That happened on May 29, 2018, more than a year ago, months before the Board decided to initiate a contested case to resolve the issue raised in the Petition, and more than six months before the pre-hearing conference.

Second, SGNA was not required to name each person who may claim an interest in the subject matter. SGNA's obligations are spelled out clearly in the Rules of Practice and

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[5] While no cottage site owner has sought to intervene, six of them (in three letters) asked to be "interested persons." "Interested persons may become protestants, intervenors or public witnesses." IDAPA 20.01.01.158.

Procedure Before the State Board of Land Commissioners, IDAPA 20.01.01. SGNA sought a declaration from the Board. It complied in all respects with the provisions of the Rules. Indeed, it was the respondent Land Board, if anyone, that had the responsibility to provide notice of the petition "in a manner designed to call its attention to persons likely to be interested in the subject matter of the petition." IDAPA 20.01.01.401. SGNA does not have the Board's authority to "issue" formal notice.

Even if it was SGNA's responsibility to somehow provide notice of the *Petition* to persons likely to be interested, it did so in serving the *Petition* upon PLCSOA, which entity was on the other side of the transaction at issue, and which entity is comprised of the members it now complains were indispensable. Such notice, six months in advance of the pre-hearing conference (which date governs the timely intervention of parties, *see* IDAPA 20.01.01.352) was more than adequate. Even if it was not, it was the Board that should have "issued" a more effective notice. Dismissal of the instant contested case is not warranted. Nor is delay of the proceedings (which Intervenors have not sought).

D. Even if Rule 19 applied, the cottage site owners are neither necessary nor indispensable parties.

Intervenors incorrectly identify the standard when they assert that "every auction purchaser is interested in the outcome here and is thus an indispensable party." Necessary parties are those whose absence "as a practical matter [would] impair or impede the person's ability to protect the interest." Rule 19(a)(1)(B)(i). Neither Rule 19 nor the cases interpreting it suggest that a mere "interest in the outcome" is sufficient.

"The party advocating for joinder has the burden of proving that the absent person should be joined." Baicker-McKee, *et al.*, *Federal Civil Rules Handbook 2019* ("*Handbook*") at 613. Here, Intervenors have offered no more than a conclusory assertion that the cottage site owners

are indispensable. They have made no effort to identify the nature of the auction purchasers' distinct interest, nor how any of the auction purchasers' ability to protect their interests will be impaired or impeded if the Board rules in favor of SGNA respecting the impropriety of the conveyance at issue.

"As a general rule, courts construing contracts require that parties to the contract be joined." *Handbook* at 611. Here, PLCSOA and the Land Board are the parties to the *Quitclaim Deeds*. They are necessary parties. The cottage site owners are not.

In any event, Rule 19 does not call for a rigid analysis of property interests. "More than most Rules, the application of Rule 19 is highly fact specific. Thus, when the court addresses questions of impairment of interest, the court will examine both legal and actual, real-world, impairment." *Handbook* at 609. One of those considerations is whether the absent parties are sufficiently represented by others. "By contrast, when the interests of an absent group are adequately represented by existing parties, the absent group need not be joined." *Handbook*, page 611.

Intervenors' contention that the cottage site owners are necessary and indispensable parties amounts to an admission that PLCSOA and WWBDA are doing such an inadequate job representing the interests of their members that justice cannot be achieved. One doubts they really intend that admission.

"Rule 19 contains no express time limit within which a party seeking joinder must file a motion. However, undue delay in filing can be grounds for denying a motion." *Handbook* at 613. As discussed above in section II.B at page 11, Intervenors have waited inexcusably long to make their contention about indispensable parties.

In sum, the auction purchasers are neither necessary nor indispensable parties. They are, at most, persons who could have complied with the applicable intervention rules if they wished to participate individually. Their decision not to do so is not a basis for terminating this declaratory ruling proceeding. Nor does it justify halting these proceedings to allow new parties to enter at the eleventh hour.

III. SGNA HAS STANDING.

SGNA addressed the issue of standing in *SGNA's Opening Brief*. As explained there, standing is not a requirement in this administrative proceeding or, in any event, may be waived in order to address an important constitutional question. But, if it is a requirement, SGNA has standing. Relatively little more needs to be said to respond to *Intervenors' Opening Brief*. Two points are addressed below.

A. The "stranger to a deed" rule is inapposite.

Intervenors contend that SGNA lacks standing because it is a "stranger" to the *Quitclaim Deeds*. Ironically, if that were a sound argument, WWBDA also lacks standing. But this is not a sound proposition of standing.

Intervenors cite *Pro Indiviso, Inc. v. Mid-Mile Holding Trust*, 131 Idaho 741, 963 P.2d 1178 (1998) (Trout, C.J.). This is a tax sale case in which delinquent taxpayers sought to shelter their property from the I.R.S.'s collection efforts by conveying it to a trust. The I.R.S. sold the liened property to a third party (Pro Indiviso) who brought eviction proceedings against the taxpayers who continued to occupy the property. The Court found the taxpayers had no standing to challenge the I.R.S. sale because they had conveyed away their interest in the property. The same result on identical facts occurred in *Scona, Inc. v. Green Willow Trust*, 133 Idaho 283, 985 P.2d 1145 (1999) (Kidwell, J.). These cases stand for the simple proposition that one cannot

"have your cake and eat it, too." When one gives away one's property, one gives away the right to complain about legal injury to that property.

These tax shielding cases should not be stretched beyond that point. They do not stand, as Intervenors would have it, for the general proposition that a "stranger to a deed" never has standing to challenge an unlawful conveyance of that deed.

The *Pro Indiviso* and *Scona* cases, by the way, contain no reference to "stranger to a deed." It may be that the Intervenors are confusing these cases with cases applying the so-called "stranger to a deed" rule. If so, that rule is inapposite.

The rule provides: "At common law, an easement could not be reserved or excepted in favor of a stranger; hence, the attempted servitude was void." Jon W. Bruce and James W. Ely, Jr., *The Law of Easements & Licenses* § 3.9. This arcane rule has not held up well. "Most commentators have criticized the rule as a pointless technicality . . . ." *Id.* Whatever its status in Idaho,[6] the "stranger to a deed" rule is not controlling here. Although occasionally described in terms of standing, it is better understood as a substantive principle of property law (and a doubtful one at that).

What matters, for purposes of standing in this *Petition*, is that SGNA and its members are not strangers to Community Beach. They own property whose use, enjoyment, and value is directly affected by the *Quitclaim Deeds*. More than that, they have a legal interest in

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[6] There are a few Idaho cases touching on the "stranger to a deed" concept. *Davis v. Gowen*, 83 Idaho 204, 209, 360 P.2d 403, 406 (1961) (Knudson, J.) appears to be the only case to actually apply the rule. Subsequent decisions have ducked the issue. *E.g.*, *Hodgins v. Sales*, 139 Idaho 225, 232-33, 76 P.3d 969, 976-77 (2003) (Trout, C.J.). Others have recognized concepts inconsistent with the "stranger to a deed" doctrine. *E.g.*, *Tower Asset Sub Inc., v. Lawrence*, 143 Idaho 710, 713, 152 P.3d 581, 584 (2007) (J. Jones, J.) ("However, we agree with the Restatement (Third) of Property that an individual has standing to enforce the right to use an easement if he or she has the right to benefit from the easement.").

Community Beach itself (in common with others through the dedications in the original grants and via their membership in PLCSOA).

B. SGNA has demonstrated injury.

Intervenors contend that SGNA has suffered no cognizable injury. Their argument appears to be one based on causation.

Intervenors contend:

> Simply wishing that it could have been deeded title to the common areas and roads and not having that wish fulfilled is not an "injury" as that word should be understood in the context of standing analysis. Indeed, in order to have been injured by the Land Board, SGNA or its members would need to have been entitled in some way to this conveyance.

Intervenors' Opening Brief at 10. This misrepresents SGNA's position.

SGNA's position is clear. The conveyance of the *Quitclaim Deeds* was unlawful. A conveyance of similar deeds to SGNA or anyone else, without a public auction, would be equally unlawful. Thus, SGNA does not contend that it is "entitled in some way to this conveyance."

What it contends is that, if there is to be any conveyance of Community Beach, SGNA and its members are entitled to bid at auction for the Trust property. Instead, they were denied that opportunity and the property was instead conveyed for a pittance (if that) to an entity intent on destroying the natural values of Community Beach that SGNA members had long enjoyed. That action of the Land Board gave rise to the injury that the *Petition* seeks to remedy.

C. The harm is redressible.

Intervenors contend the SGNA's injury is not redressible. Redressability is an element in the analysis of standing. As explained in *SGNA's Opening Brief*, standing does not apply or may be waived. However, even if the causation requirement of standing were applicable, it is no bar to the relief sought by SGNA.

As explained in *SGNA's Opening Brief* at 39-42, and as forcefully made clear in *Wasden v. State Bd. of Land Comm'rs* ("*Wasden II*"), 153 Idaho 190, 195, 280 P.3d 693, 698 (2012) (J. Jones, J.), the Attorney General is "obligated to remedy noncompliance with trust responsibilities." It is fair to assume that redress will occur in due course.

Thus, it is of no consequence whether the Land Board has the authority, in this particular proceeding, to void the *Quitclaim Deeds*. Plainly, the Land Board has the authority to declare that the deeds were issued in violation of law and statute. It is also evident that the Land Board and/or the Attorney General have authority to take further action once the unconstitutionality of the *Quitclaim Deeds* is established. (In the unlikely event that these State entities ignore their responsibilities, SGNA will be in a position to seek further relief.) That is sufficient to establish standing.

Indeed, the Land Board recognized just last April that it has the power to rescind a conveyance made in violation of the public auction requirement in Idaho Const. art. IX, § 8. See SGNA's *Response to Land Board*, section V at 15 (discussing the rescission of Lease M500031 issued to The Grove McCall LLC for an events center on Payette Lake endowment lands).

In the Idaho Education Network litigation, *Syringa Networks v. Idaho Dep't of Admin.* ("*Syringa I*"), 155 Idaho 55, 60-62, 305 P.3d 499, 504-06 (2013) (Eismann, J.) and *Syringa Networks, LLC v. Idaho Dep't of Admin.* ("*Syringa II*"), 159 Idaho 813, 823-24, 367 P.3d 208, 218-198 (2016) (J. Jones, J.), the Court found that the plaintiff had standing to challenge an illegally issued contract to which it was not a party notwithstanding the fact the Court lacked the authority to order repayment of funds under the void contract.

> Syringa is correct that the statute provides mandatory consequences. . . . But it imposes no obligation on the district court to preemptively order that DOA comply with this obligation [to seek repayment of funds]. If the appropriate State officer fails

> to perform this statutory obligation, the State's chief legal officer can step forward to make the State whole for these unfortunate violations of State law.

Syringa II, 159 Idaho at 830, 367 P.3d at 225.

Notwithstanding that some additional steps might be required, the Court found Syringa met the redressability requirement and had standing. "Syringa has alleged a distinct and palpable injury, not suffered by all Idaho citizens, that is alleged to have been caused by the challenged conduct and that can be redressed by judicial relief." *Syringa I*, 155 Idaho at 62, 305 P.3d at 506. In other words, if the decision in the proceeding at hand sets in play events that are reasonably likely to ultimately provide the relief sought, that is sufficient to establish standing.

The *Syringa* litigation is instructive.[7] In it, the State employed every procedural and technical argument under the sun to avoid addressing its plain violation of law (a duty to

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[7] *Syringa* involved a challenge by Syringa Networks, LLC, a subcontractor to a successful bidder in the construction of the Idaho Education Network ("IEN"). The IEN was a publicly funded undertaking to bring a network of high-bandwidth telecommunications to public schools, libraries, and agencies across the State. Competitive bidding for the project was overseen by the Idaho Department of Administration ("DOA").

DOA issued a Request for Proposals ("RFP") in 2008. It explained that each bidder must provide "a total end-to-end service support solution" (*i.e.*, system-wide proposals only). *Syringa I*, 155 Idaho at 59, 305 P.3d at 503. Accordingly, Syringa entered into a "teaming agreement" with ENA Services in order to provide a comprehensive joint proposal. The joint proposal was submitted by ENA, with ENA providing "E-rate" management and Syringa (serving as a subcontractor to ENA) constructing the "network backbone." Competing proposals were filed by two other bidders.

DOA awarded two contracts (known as Statewide Blanket Purchase Orders ("SBPOs")), to ENA and to Qwest. These were for identical services, but would be split geographically. Thus, ENA (with Syringa as its "backbone" subcontractor) would construct a substantial portion of the project, while Qwest constructed the rest, based on some yet-to-be-determined geographic division.

One month later, DOA modified the awards. Under the amendment, Qwest would build the backbone on a statewide basis, and ENA would provide E-rate services statewide.

Syringa sued DOA (and individual officials), Qwest, and ENA, alleging violations of statutory bidding procedures. Everyone agreed that the DOA could issue multiple contracts only for the same or similar property. DOA contended, however, that it was not restricted from

maximize the State's financial interest not dissimilar to the Land Board's trust duty here). In the end, the Court swept aside the technical arguments and cut to the core of the issue, quoting the particularly forceful language in an oft-quoted 1956 decision: "[M]ere schemes to evade law, once their true character is established, are impotent for the purpose intended. Courts sweep them aside as so much rubbish." *Syringa II*, 159 Idaho at 829, 367 P.3d at 224 (quoting *Syringa I*, 155 Idaho at 62, 305 P.3d at 506) (quoting, in turn, *O'Bryant v. City of Idaho Falls*, 78 Idaho 313, 325, 303 P.2d 672, 678 (1956) (Porter, J.)) (brackets original).

CONCLUSION

In its decision to rescind the Tamarack Bay lease, the Land Board concluded, wisely and correctly, it has the authority and the responsibility to unwind an illegal transaction. There is no reason the Land Board should not do the same here. Recognition that the *Quitclaim Deeds* were issued in violation of law will enable that error to be corrected in a manner protective of the legitimate interests of all concerned, including Intervenors, thereby enabling the State to adhere to its trust obligations. Intervenors' procedural defenses to this outcome are ineffective. And its

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subsequently modifying the contracts to differentiate their scopes. "They believed they could do in two steps what they could not do in one." *Syringa I*, 155 Idaho at 61, 305 P.3d at 505.

Syringa I dealt with challenges to Syringa's standing, as well as other defenses and side-issues. The case was remanded to evaluate the merits of the alleged violations of state procurement law.

On the second appeal, the Court first upheld the district court's ruling that, even if Syringa could not raise the issue, the Court had an independent duty to invalidate them. *Syringa II*, 159 Idaho at 822-23, 367 P.3d at 217-18. The Court then found the case was not mooted by the State's purported rescission of the contracts. *Syringa II*, 159 Idaho at 826, 367 P.3d at 221.

The Court then reached the merits, holding that even if the original contracts were lawful, they were rendered unlawful and void by the subsequent illegal amendments. *Syringa II*, 159 Idaho at 829, 367 P.3d at 224. The Court then addressed the elephant in the room: The fact that millions of dollars had already been expended by the State in constructing the system under void contracts. Although no relief was provided in this proceeding, it noted that the Attorney General may be expected to "step forward to make the State whole for these unfortunate violations of State law." *Syringa II*, 159 Idaho at 830, 367 P.3d at 225.

equitable argument cuts in the opposite direction. Given the important public policy at stake, equity demands a resolution of these constitutional questions.

Intervenors obtained a windfall to the detriment of the Trust. SGNA seeks no such windfall. Its goal is to protect Community Beach in its natural state in perpetuity for the benefit of all. To do that, it will need to put its money where its mouth is, at a public auction. All it seeks is the opportunity that the Constitution mandates.

Respectfully submitted this 14th day of June, 2019.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 14th day of June, 2019, the foregoing was filed, served, and copied as follows:

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